

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co. and International Brotherhood of Teamsters, Local 385, Petitioner. Case 12-UC-203052

January 25, 2019

DECISION ON REVIEW AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue presented in this case is whether the Regional Director properly clarified the existing units of certain of the Employer's employees who work at Walt Disney World Resort in Bay Lake, Florida, to include Ride Service Associates (RSAs).

On May 8, 2018, the Regional Director issued a Decision and Order Clarifying Bargaining Units in which he granted the Petitioner's petition for unit clarification to include the RSAs, finding that they perform the same basic functions historically performed by unit employees and thus are included in the unit under the principles articulated in *Premcor, Inc.*, 333 NLRB 1365 (2001). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review contending that the Regional Director erred in applying *Premcor* and instead should have found that the record does not establish that the RSAs are an accretion to the existing units. The Petitioner filed an opposition to the request.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the reasons stated below, the Employer's Request for Review of the Regional Director's Decision and Order Clarifying Bargaining Units is granted as it raises substantial issues warranting review. Upon review, we find that the Regional Director erred in applying *Premcor*. We further find that the undisputed facts as found by the Regional Director are insufficient to meet the Board's traditional accretion standard.² We accordingly reverse the Regional Director's clarification of the bargaining units to include the RSAs, and we dismiss the petition.

¹ On August 9, 11 Proposed Intervenor Employees filed a Motion to Intervene and a Request for Review. The Board denies the Proposed Intervenor Employees' Motion to Intervene, but has considered their Request for Review as an amicus brief.

² Based on our resolution of these issues, we need not pass on the Regional Director's conclusion that the Petitioner did not disclaim interest in representing the RSAs under *Briggs Indiana Corp.*, 63 NLRB 1270 (1945), and its progeny.

Facts

The Employer and the Service Trades Council Union, of which the Petitioner is a member, are parties to two collective-bargaining agreements, one covering all regular full-time employees and the other all regular part-time employees, who are employed by the Employer in specific job classifications listed in Addendum A of the collective-bargaining agreements. The agreements are effective March 30, 2014, through September 21, 2019. The Employer has voluntarily recognized the Council since 1972.

Among the specific job classifications in Addendum A of the collective-bargaining agreements are Bus Drivers, whose primary function is the safe operation of a bus. Bus Drivers operate along an assigned route, whether they have passengers or not, and stop at each assigned stop until the route is completed. Once the route is completed, the driver completes the route again or is dispatched to another route. Bus Drivers do not deviate from their assigned route unless directed by a supervisor to begin driving on another predetermined route. They do not make interim stops or change their routes in response to guest requests. Bus Drivers do not receive any specialized training in "guest recovery," which permits an employee to respond to a guest's complaint without managerial approval. If guests have specific concerns that they discuss with the Bus Drivers, the drivers provide the guests with standard information about whom to contact regarding the concern. Bus Drivers play prerecorded audio taped information over the public address system while carrying passengers to the next destination on the route. When they speak to customers, they do so through a set of memorized speeches. They are not responsible for the maintenance of the buses they drive. Bus Driver training lasts about 14 consecutive weeks. Bus Drivers are required to obtain and maintain a commercial driver's license (CDL).

Also included in Addendum A are Parking Host/Hostesses (PHHs) who direct traffic in the Employer's parking lots and may drive an open-air tram to transport high volumes of guests from parking lots to parks. While they are driving, they do not regularly interact or speak with guests, though one PHH may deliver a speech to the riders in general while another drives the tram. They are not required to possess a CDL.

In March 2017, the Employer entered into a collaboration with Lyft, a mobile phone "ridesharing" or "ride-hailing" application that summons a vehicle to take riders from their location to a destination of their choice. The Employer created the new RSA position at issue here in conjunction with this service. The functions of the RSAs are distinct from the other transportation workers at the

Employer's facility. RSAs are summoned on demand to guests' location to transport the guests to a location of their choice on the Employer's property. RSAs are trained to engage in unscripted, impromptu conversations with riders about their experiences. To facilitate these conversations, the RSAs receive specialized training in storytelling and guest engagement, are expected to know about events occurring on the Employer's property, and are required to listen to and engage guests on topics that the guests are interested in. RSAs are expected to have knowledge of the Employer's entire property and to answer guest questions. RSAs are also trained on and expected to engage in guest recovery to independently respond to guest complaints and concerns. RSAs do not work any fixed routes, but rather drive to places at the guests' command, including making interim stops at the guests' request. RSAs are not required to have a CDL, as they operate non-commercial minivans and sport utility vehicles. They also do not receive any special training on the operation of the minivans and SUVs. RSAs are responsible for the maintenance and cleanliness of the vehicles they drive. RSA training lasts about two weeks. The RSA position did not exist at the time the parties entered into their current collective-bargaining agreements and is not included in the list of classifications in Addendum A.

The Regional Director's Decision

Applying *Premcor*, supra, the Regional Director found that the RSAs perform the same basic function that has historically been provided by the bargaining unit Bus Drivers: the general transportation of guests between lodging and attraction locations within the confines of the Employer's property.³ He further found that there are some differences between the work performed by RSAs and Bus Drivers due to technological advances, but that the technological differences do not preclude the new position from being part of the unit when the functions performed are essentially the same. See *id.* at 1366; see also *Gourmet Award Foods, Northeast*, 336 NLRB 872 (2001). The Regional Director noted that RSAs have more personal interaction with guests than Bus Drivers or PHHs, but attributed that difference in the level of interaction to the fact that RSAs transport only small groups of customers as opposed to Bus Drivers and PHHs. The Regional Director also concluded that, notwithstanding the degree of guest interaction, all of these employees are required to impart information about the

Employer's attractions, to entertain guests, and to take steps to resolve guest complaints. As a result, he found that the RSAs are already included in the existing units and clarified them to include the RSAs.

Analysis

It is well established that unit clarification petitions are appropriate for resolving ambiguities regarding the unit placement of individuals who come within newly-established classifications. *Union Electric Co.*, 217 NLRB 666, 667 (1975). The Board views a new classification as already belonging in the bargaining unit (rather than being added to it by accretion) if that new classification performs the same basic work functions historically performed by unit employees. *Premcor*, 333 NLRB at 697; see also *Developmental Disabilities Institute*, 334 NLRB 1166 (2001). But if the Board finds that the *Premcor* test is not satisfied, it will add or "accrete" the new classification to the unit only if the employees sought to be added "have little or no separate identity and share an overwhelming community of interest" with preexisting unit employees. *AT Wall Co.*, 361 NLRB 695, 697 (2014) (internal quotations omitted); see also *Safeway Stores*, 256 NLRB 918, 918 (1981).

For example, the Board declined to apply *Premcor* and instead applied the traditional accretion analysis in *AT Wall*, supra. In that case, an employer, through acquisition of another company, began manufacturing a new product line (Metalform) using new equipment and different processes in a separate department, and the petitioner contended that the new Metalform employees should be included in the existing unit, which included employees in two of the employer's other production departments (Tubing and Stamping). The Board concluded that *Premcor* did not apply because the Metalform employees' actual functions in producing the new product line were not the same as the Tubing and Stamping employees' functions, given that they made substantially different products using different machinery and processes requiring different training. See *AT Wall*, 361 NLRB at 698. The Board also noted that the unit was narrowly defined by 21 listed classifications grouped by department, and found it significant that no Metalform employees had displaced unit employees or performed the unit employees' work. See *id.* Therefore, the new classifications could not properly be considered as "already" in the unit, and the Board went on to find that the Metalform employees did not constitute an accretion to the unit. See *id.* at 698–699; see also *Pepsi Beverage Co.*, 362 NLRB No. 25, slip op. at 6–7 (2015) (declining to apply *Premcor* and finding no accretion warranted).

Having carefully reviewed the Regional Director's Decision, the Employer's Request for Review, the Peti-

³ As indicated below, the Regional Director also discussed similarities between the RSAs and PHHs in his application of *Premcor*, but he did not make a separate finding that RSAs perform the same basic functions as PHHs.

tioner's opposition, and the amicus brief, we find that the Regional Director should not have applied *Premcor*. The units at issue are defined by a list of classifications,⁴ so in order to be added to the units, the RSAs must be shown to perform the same basic functions as employees in a classification or classifications listed as within the units. See *AT Wall*, 361 NLRB at 698. Here, the Regional Director found that the RSAs perform the same basic functions as Bus Drivers, and the only other potentially comparable classification he discussed was the PHHs.

Contrary to the Regional Director, we find that the evidence does not demonstrate that RSAs perform the same basic functions as Bus Drivers (or, for that matter, PHHs). RSAs operate minivans and sport utility vehicles, whereas Bus Drivers operate commercial buses. RSAs respond to specific customer requests for pick-up and drop-off and drive wherever the customer dictates, but Bus Drivers operate only on a predetermined route and must drive on that route whether or not they are currently transporting customers. In order to perform their basic functions, RSAs require only a driver's license, but Bus Drivers require a CDL. Differences in training also highlight the differences in basic functions. RSAs receive only two weeks of training, whereas Bus Drivers receive 14 weeks of training, including their CDL training that the Employer provides. Even more importantly, RSAs are imbued with the authority to independently respond directly to customer complaints, and they receive training on interacting with guests in a personal, unscripted, one-on-one capacity based on the guests' interests and needs. In contrast, Bus Drivers perform mere courtesy tasks for guests such as handing out stickers and reciting from memorized scripts; they receive no comparable training in unscripted guest interaction. As for the PHHs, they drive trams transporting guests between parking lots and parks, but it is unclear whether driving is the PHHs' primary function. In any event, they drive trams as opposed to minivans and SUVs, do not transport guests from point-to-point on demand, and do not interact with guests in a manner comparable to the RSAs while driving the trams.

Although RSAs and Bus Drivers (and PHHs) may all be engaged in driving vehicles that transport guests, this does not establish that they perform the same basic functions within the meaning of *Premcor*. As *AT Wall* teaches, the *Premcor* test does not compare employee functions at the broad level used by the Regional Director here. In that case, the Acting Regional Director essen-

tially characterized both the Metalform employees and the Tubing and Stamping employees as engaged in "production and maintenance," *AT Wall*, 362 NLRB at 607, but the Board differentiated between them using a narrower analysis that relied on the specific types of products manufactured, the specific types of equipment used, and the training involved. Applying the *AT Wall* approach to defining the positions, the RSAs here drive different vehicles under different conditions, receive different training, and engage in different types of guest interaction than the Bus Drivers or PHHs.

Further, similar to *AT Wall*, we find it significant that there is no indication that the creation of the RSA position has disrupted the purportedly-comparable unit classifications. Thus, although roughly half of the approximately 74 RSAs are former unit employees, only 3 of them are former Bus Drivers, and there is no indication that any RSAs are former PHHs. There is also no indication that unit classifications were contracted or displaced by the creation of the RSA position, in contrast to the "replace and eliminate" scenario present in *Premcor*, 333 NLRB at 1366. Instead, RSAs perform brand-new functions using different equipment and different skills gained through different training to serve guests in a distinct manner, while unit employees continue to perform their functions as they did before.

Finally, we reject the Regional Director's apparent suggestion that the differences between RSAs and unit employees are due to technological advances. Although the development of applications such as Lyft has doubtlessly facilitated the type of service performed by the RSAs, and was apparently the Employer's motivation for creating the RSA classification, the transportation part of the service—on-demand transport of passengers from one point to another—is not a new idea. Indeed, the idea of individualized transport can be traced back to the role historically filled by taxi drivers long before ride-hailing applications. There is no suggestion that any unit classifications (or any of the Employer's classifications in general) provide or previously provided taxi services. The other part of the RSA work—specialized unscripted guest interaction and the ability to answer questions or remedy guest problems—is also unrelated to the technology that guests use to summon the RSAs. Both parts of the RSAs' work is therefore distinct from unit employees regardless of the role of technology in the service. Thus, the Employer did not create the RSA classification in order to utilize new technology in performing a function previously performed by a unit classification. Cf. *Premcor*, 333 NLRB at 1366 (finding that a new classification remained in the bargaining unit where it performed the same basic control functions as an existing unit classifi-

⁴ Contrary to the Regional Director, the parties do not define the units by the work performed. The current agreement defines the units as "employees who are in the classification[s] of work listed in Addendum A," which is simply a list of included classifications.

cation but used new technology to do so). Instead, it is the core functions of the RSAs' work and the nature of their interaction with guests that underscores their distinction from Bus Drivers and PHHs.

In sum, although bus, tram, and now rideshare services may all play a role in the Employer's overall guest transportation network, and all services involve conveying passengers from one point to another, we are unwilling to hold that the RSAs and the Bus Drivers (or the PHHs) are functionally equivalent in light of the many differences identified above, particularly when, as here, such a holding would add the RSAs to the existing unit without the opportunity to exercise their free choice in the matter. Accordingly, *Premcor* does not support clarifying the units to include RSAs.

As discussed above, when the *Premcor* test is not applied, a new classification is accreted to an existing bargaining unit "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." *AT Wall*, 361 NLRB at 697 (quoting *CHS, Inc.*, 355 NLRB 914, 916 (2010)); see also *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005), enfd. mem. 181 Fed. Appx. 85 (2d Cir. 2006); *Safeway Stores, Inc.*, 256 NLRB 918 (1981). An accretion claim is defeated either where the evidence fails to show "no separate identity" or the evidence does not establish an "overwhelming community of interest." *Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1271. The Board follows "a restrictive policy in finding accretions to existing units because the Board seeks to ensure that the right of employees to determine their own bargaining representatives is not foreclosed." *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). In making this determination, the Board analyzes the standard community-of-interest factors: interchange and contact among employees, degree of functional integration, geographical proximity, similarity of working conditions, similarity of employee skills and functions, common supervision, and collective-bargaining history. *E. I. Du Pont Inc.*, 341 NLRB 607, 608 (2004) (citing *Archer Daniels Midland Co.*, 333 NLRB at 675). The Board recognizes that "the normal situation presents a variety of elements, some militating toward and some against accretion, so that a balancing of factors is necessary." *E. I. Du Pont*, 341 NLRB at 608 (quoting *Great Atlantic & Pacific Tea Co. (Family Savings Center)*, 140 NLRB 1011, 1021 (1963)). However, the Board has held that the "two most important factors—indeed, the two factors that have been identified as critical to an accretion finding—are employee interchange and common day-to-day supervi-

sion," and therefore their absence "will ordinarily defeat" an accretion claim. *Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1271 & fn. 7 (internal quotations omitted). The burden to show that accretion is appropriate is "heavy," and it falls on the requesting party. *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 6. Here, that party is the Petitioner.

Although the Regional Director did not consider a traditional accretion analysis, the undisputed facts as found by the Regional Director fail to meet the relevant standard. To begin, the RSAs' different functions, licensing, equipment, and training discussed above show that they have a separate group identity from bargaining unit employees.

Moreover, the available evidence also does not establish that the RSAs share an overwhelming community of interest with the employees in the existing unit. Regarding the "critical" factors of employee interchange and common day-to-day supervision, there is very limited evidence of employee interchange between the RSAs and unit employees. RSAs cannot perform bus driving services without a CDL license and the proper training, and Bus Drivers cannot perform RSA driving services without appropriate training in unscripted guest interaction, among other skills. Given these distinct training and licensing requirements, the record unsurprisingly shows no evidence of temporary interchange between RSAs and Bus Drivers.⁵ Although there is evidence that 3 of approximately 74 RSAs are former Bus Drivers, permanent transfers are a less significant indication of actual interchange than temporary transfers. *Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1272 (citing *Novato Disposal Services*, 330 NLRB 632, 632 fn. 3 (2000)). There is also no evidence of shared day-to-day supervision. Although RSAs and Bus Drivers are both in the Transportation Division, which is overseen by a Vice President of Transportation Operations, their common supervision ends there, as several distinct layers of supervision separate the Vice President of Operations from the bus drivers and the RSAs, respectively.⁶ Therefore, the RSAs and the Bus Drivers do not share common first-line supervisors. Common management limited to the executive level does not alone establish common day-to-day supervision. See *Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1272–1273 (no accretion where employees

⁵ The Board distinguishes between two types of employee interchange—temporary transfers and permanent transfers—and it regards temporary transfers as more important than permanent transfers when analyzing whether accretion is appropriate. *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 4 fn. 9 (2015) (citing cases). There is also no evidence of temporary interchange between PHHs and RSAs.

⁶ There is also a separate chain of command for PHHs.

sought to be accreted share “centralized” management with unit employees, but were not supervised by the same first-level supervisors); *E.I. Du Pont*, 341 NLRB at 609 (employee not accreted into unit where employee was supervised on a day-to-day basis by a supervisor who did not supervise any unit employees). Together, the absence of these two critical factors prevents us from finding an overwhelming community of interest here. See, e.g., *NV Energy, Inc.*, 362 NLRB No. 5, slip op. at 4.

In addition, several other factors do not support an accretion finding. First, there is no meaningful functional integration between RSAs and Bus Drivers, aside from the fact that RSAs may at times pick up and drop off passengers in the same loading zones used by bus drivers. However, their transports do not overlap and are not part of an integrated chain of transport. Second, there is little to no evidence that the RSAs and Bus Drivers have significant contact. They do pick up and drop off guests at the bus load zones, but there is no evidence regarding the amount of time they spend interacting with one another. Third, although the RSAs and Bus Drivers possess some of the same skills insofar as they both operate motor vehicles and are expected to interact with guests in a positive manner, and they both receive training on such interactions, the RSAs receive significantly more training and training of a different nature on individually tailored and unscripted guest relations than the scripted Bus Drivers do, and Bus Drivers receive training to earn their CDL license that RSAs do not. As such, skills and functions do not favor accretion. Fourth, the collective-bargaining history does not support accretion, as the RSA position is a new position that has never been bargained over or included in a collective-bargaining agreement.

As is usually the case, some factors here may support an accretion finding. In this respect, Bus Drivers and RSAs have similar working conditions and share geo-

graphic proximity to one another because they both operate motor vehicles on the Employer’s property. As the foregoing considerations demonstrate, however, the Petitioner has not satisfied its heavy burden of demonstrating that RSAs share an overwhelming community of interest with the Bus Drivers, particularly given the absence of the “critical” factors, which “ordinarily” defeats an accretion claim. *Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1271 fn. 7.

In sum, *Premcor* and its progeny do not apply here. Further, under the standard articulated in *Safeway Stores*, an accretion finding is unwarranted here because under the facts as found by the Regional Director, the Petitioner has not established that the RSAs have little or no separate group identity, nor has the Petitioner shown they share an overwhelming community of interest with bargaining unit employees. We therefore reverse the Regional Director’s Decision.

ORDER

The Regional Director’s Decision and Order Clarifying Bargaining Units is reversed and the petition is dismissed.

Dated, Washington, D.C. January 25, 2019

Lauren McFerran,	Member
------------------	--------

Marvin E. Kaplan,	Member
-------------------	--------

William J. Emanuel	Member
--------------------	--------

(SEAL) NATIONAL LABOR RELATIONS BOARD